IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 1ST NOVEMBER 2007 / 10TH KARTHIKA 1929

RSA.No. 891 of 2007()

AS.215/2003 of ADDITIONAL DISTRICT COURT (ADHOC), ERNAKULAM
OS.1930/1998 of II ADDL.M.C., ERNAKULAM

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: APPELLANTS/APPELLANTS/DEFENDANT NOS.1TO 4

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1. V.X.ABRAHAM, S/O.LATE ABRAHAM SOURO,
   VALIYAPARAMBIL HOUSE, KATHRIKADAVU DESOM,
   ELAMKULAM VILLAGE, KANAYANNUR TALUK,
   ERNAKULAM DT.

2. BAIJU ABRAHAM, S/O.V.X.ABRAHAM, DO. DO.

3. BIMAL ABRAHAM, S/O.V.X.ABRAHAM,
   DO. DO.

4. BIPIN ABRAHAM, S/O.V.X.ABRAHAM,
   DO. DO.

BY ADV. SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN
SRI.P.T.GIRIJAN
SMT.USHA NARAYANAN
SRI.NELOSN MANAYIL.

RESPONDENTS: RESPONDENTS/PLAINTIFF & DEFENDANT 5 TO 7

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1. GEORGE JAIN, S/O.XAVIER,
   VALIYAPARAMBIL HOUSE, KATHRIKADAVU,
   KALOOR, KOCHI-17.

2. LAL XAVIER, S/O.XAVIER, DO. DO.

3. PRINTY JOSEPH, W/O.JOSEPH, DO. DO.

4. ELISWA GEORGE, W/O.LATE GEROGE, DO. DO.

5. M.N.MUKUNDAN, S/O.LATE NARAYANAN,
   PONOTH ROAD, KALOOR, KOCHI-17.

6. GEORGE MANUEL, S/O.LATE GEORGE,
PALLIPARAMBIL HOUSE, SANILA PAROTH ROAD,
KALOOR, KOCHI-17.

7. PRAVEEN, S/O.GEORGE MANUEL,
DO. DO.

8. KINATHUMKARA SAMOOHA MADOM, CHITTOOR
ROAD, KOCHI-35, REPRESENTED BY ITS PRESIDENT
SRI.S.KRISHNA IYER, S/O.SANKARASUBHA IYER,
RESIDING AT 38/1648, T.D.ROAD, ERNAKULAM.

BY ADV. SRI.V.V.SIDHARTHAN (CAVEATOR)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 01/11/2007,ALONG WITH RSA NO. 892 OF 2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:-

ORDER ON I.A.NO.1844/2007 IN R.S.A.NO.892/2007

1.11.2007 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.891 & 892 OF 2007

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Dated this the 1st day of November, 2007

JUDGMENT

First defendant in O.S.1074/1997 is the sole appellant in R.S.A.892/2007. He is the first appellant in R.S.A.891/2007. Defendants 1 to 4 in O.S.1930/1998 are the appellants therein. Respondents 1 to 7 and 8 are the plaintiffs. Respondents 2 to 6 in R.S.A.892/2007 are the respondents 1 to 5 in R.S.A.891/2007. Seventh respondent is the 8th respondent in R.S.A.891/2007. O.S.1074/1997 was filed seeking a decree for declaration that appellant in R.S.A.892/2007 has no right other than the right to reside in the building in the plaint schedule property as a kudikidappukaran and also for a declaration that Ext.A8 (Ext.B2) is a sham and nominal document and will not affect the right of respondents over the plaint schedule property and for a permanent prohibitory injunction restraining appellant from

executing any document on the strength of Ext.A8 or obstructing respondents from enjoying the plaint schedule property or committing any waste therein. That suit was originally filed by first respondent Kinathumkara Samooha Madom. But subsequent to the assignment of the rights of first respondent in favour of respondents 2 to 6,respondents 2 to 6 got themselves impleaded as additional plaintiffs 2 to 6. They in turn filed O.S.1930/1998 seeking a decree for fixation of the boundary and for injunction. Plaint schedule property in both the suits is the same. It is having an extent of 82 cents in survey No.310/2 of Elamkulam Village. It admittedly originally belonged to Elangalloor Swaroopam. Case of respondents plaintiffs was that plaint schedule property was outstanding in the possession of judgment debtors in O.S.21/1109 M.E of Anjukaimal District Court, on adimavakasam and their right was sold in execution of the decree in O.S.21/1109 and was purchased by first respondent Kinathumkara samooha Madom and Ext.A2 sale

certificate was obtained and thereafter delivery of the property was taken under Ext.A3 on 30.1.1110 M.E and Exts.A4 and A5 kanom deeds were obtained from Elangalloor Swaroopam and thereby first respondent Kinathumkara Samooha Madom has title to the property. After the institution of the suit, on 7.11.1998 under Ext.A9 the property was sold in favour of respondents 2 to 6. They claim title to the property and contended that appellants have only the right of residence in the building in plaint schedule property and apart from kudikidappu right they have no other right over the plaint schedule property. It was contended that while so under Ext.A8 (which is the same Ext.B2) appellant obtained jenm right from Elangalloor Swaroopam on 10.1.1997 and Swaroopam had no right to assign the jenm right and Ext.A8 is null and void and appellants did not derive any title to the property. In O.S.1074/1997, first respondent and thereafter respondents 2 to 6 sought a decree for declaration of their right and also for a

declaration that Ext.A8 is null and void and is not valid and binding on the plaint schedule property and appellants have no right over the plaint schedule property except kudikidappu right in respect of the building. In O.S.1930/1998 original plaintiff in O.S.1074/1997 sought a decree for fixation of the boundary and a permanent prohibitory injunction. The suits were resisted by appellants contending that respondents did not derive any right or title to the property under Ext.A2 sale certificate and Ext.A3 was only a symbolic delivery and possession was not obtained by respondents and they have no right over the plaint schedule property. It was contended that plaint schedule property has been in the absolute possession and enjoyment of the appellant in R.S.A.892/2007, as a tenant, for the last 45 years having been obtained it from Elangalloor Swaroopam and since then pattom was being paid to the jenmi and appellant in R.S.A.892/2007 has been residing in the building and father of appellant as well as

his brothers were residing in the plaint schedule property depending on the appellant in R.S.A.892/2007 and two brothers of the appellant constructed two other houses in the plaint schedule property for their residence with the consent of the appellant in R.S.A.892/2007 and son of the appellant is conducting a Press in a building constructed adjacent to the building in which appellant was residing and respondents never obtained yield from the plaint schedule property and they are not in possession of the property and appellant purchased the jenm right of the property from Elangalloor Swaroopam as per Ext.B2 sale deed and it is valid and binding on plaint schedule property and respondents are not entitled to the decree sought for. In the additional written statement it was contended that rent was being collected from the predecessor in interest of the appellant and thereafter from appellant in 1997 he purchased jenm right from the Elangalloor Swaroopam and respondents are not entitled to

challenge the same and therefore the suit is only to be dismissed. In O.S.1930/1998, the same contentions were raised. In addition it was contended that respondents are not entitled to fixation of the boundary as sought for.

2. Both the suits were jointly tried. On the side of respondents/ plaintiffs PW1 was examined and Exts.A1 to A41 and Exts.C1 to C3 were marked. On the side of appellants Dws.1 to 7 were examined and Exts.B1 to B10 were marked. Learned Munsiff on the evidence found that under Ext.A2 sale certificate first respondent Kinathumkara Samooha Madom obtained the property and it was taken delivery under Ext.A3 and the admitted landlord, Elangalloor Swaroopam recognised that right under Ext.A4 and A5 and respondents have title to the plaint schedule property. Learned Munsiff also found that appellants did not establish any tenancy right and they have only kudikidappu right over the building and Ext.A8 is null and void and not binding on the plaint schedule property and

respondents are entitled to the decree sought for in O.S.1074/1997. O.S.1930/1998 was partly decreed restraining appellants from putting up any additional structure in the plaint schedule property or for interfering with the possession and enjoyment of the property by respondents. Appellants challenged the decree and judgment before District Court, Ernakulam in A.S.214/03 & A.S.215/2003. Learned Additional District Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeals. These second appeals are filed challenging the common judgment. R.S.A.891/2007 is filed against the concurrent judgment in O.S.1930/1998 and R.S.A.892/2007 against the concurrent judgment in O.S.1074/1997.

3. Learned counsel appearing for appellants and learned counsel who appeared for respondents, by lodging a caveat, were heard.

4. The arguments of learned counsel appearing for appellants are that courts below did not

properly appreciate the evidence or decided the question involved in the suit in the proper perspective and in the light of the settled legal position. It was argued that when respondents are relying on Ext.A2 and A3, to prove their title Ext.A2 does not disclose what right was purchased by first respondent and the right purchased under Ext.A2 was that of the judgment debtors in O.S.21/1109 M.E. It was argued that Ext.A3 is only a paper delivery and by the symbolic delivery, possession of the property was not obtained and when appellants are not parties to O.S.21/1109, courts below should not have relied on the symbolic delivery to uphold the title of respondents. Learned counsel also argued that under Ext.A4 and A5, first respondent did not obtain any title to the property and first respondent had no right to transfer the property in favour of respondents 2 to 6 and though PW1 claimed that rights were assigned after obtaining sanction as provided under Cochin Devaswom Act, there is no such Act and the

transfer is illegal and therefore courts below should not have upheld the title. Learned counsel also argued that in paragraph 10 of the written statement it was specifically pleaded that title of respondent, if any, was lost by adverse possession and inspite of the specific pleading no issue was raised by trial court on that question and adverse possession was not considered by the trial court and first appellate court also did not decide that question holding that appellants are in possession of the property. It was argued that reliance was placed on Ext.A32 judgment in O.S.559/1994, which is not inter parties and even if Ext.A32 is relied on, it would only show that first appellant had claimed right of kudikidappu, if any and not that he is a kudikidappukaran. It was also argued that Ext.A32 judgment in O.S.559/1994 which is not inter parties should not have been relied on and in any case without producing the pleading no reliance could be placed on the judgment and courts below should

not have relied on Ext.A32 to negative the claim of adverse possession. Learned counsel further argued that in such circumstance question of adverse possession is necessarily to be considered and as it was not considered, case is to be remanded to the trial court. Learned counsel also argued that it is admitted case that proceedings are pending before Land Tribunal claiming tenancy right as well as kudikidappu right and as those questions were not settled, the question of tenancy should have been referred to the Land Tribunal or courts below should have at least waited for the decision of the competent Land Tribunal, which is the proper authority to decide the question of tenancy and in such circumstance, decision of the courts below are not sustainable. Learned counsel also argued that serious objections were raised to the report submitted by the Commissioner and the objections were not properly considered by the courts below and therefore the decree and judgment are to be set aside. Learned counsel appearing for respondents

submitted that courts below considered all the questions in the proper perspective. It was pointed out that when appellants claimed in the suits that there was a lease from Elangalloor Swaroopam 45 years back, as evidenced by Ext.A32 judgment and Ext.A33 deposition of the appellant in R.S.A.892/2007 when examined in O.S.559/1994 as PW1, that the tenancy was under first respondent and in such circumstance appellants are not entitled to dispute the title of respondents. Learned counsel read over the portion of deposition of appellant as PW1 in O.S.559/1994, marked as Ext.A33 (a) to A33(g) by the trial court, and argued that plea of tenancy claimed earlier was contrary to the one raised in the present suit and in such circumstance claim for tenancy was rightly rejected by courts below. Learned counsel also argued that when under Ext.A2 first respondent has purchased the right of adimavakasam over the plaint schedule property, as evidenced by Ext.A2, under Ext.A4 and A5 Elangalloor Swaroopam recognised

that right and in such circumstances Swaroopam could not have assigned the jenm right under Ext.A8 in favour of appellants and Ext.A8 was rightly held to be null and void and not binding on plaint schedule property. It was pointed out that even if the case of appellants that they are tenants of the property is correct, after 1.1.1970 jenm right could not have been assigned, as seen in Ext.A8, as jenm right of the leasehold property would vest with the Government as on 1.1.1970. It was therefore argued that the courts below rightly declared that Ext.A8 is null and void and not binding on the plaint schedule property. Learned counsel further argued that though not inter parties, Ext.A32 judgment is in a suit instituted by first respondent and hence it is binding on appellant and Ext.A32 with Ext.A33 deposition establish the hollowness of the appellants case and in such circumstance courts below rightly granted the decree.

5. Though learned counsel appearing for

appellants vehemently argued several questions of law as arising in the appeal, which according to learned counsel are substantial questions of law, On going through the judgments of the courts below, I do not find that any substantial question of law is involved in the appeal.

6. True, a sale certificate and account evidencing delivery of the property obtained pursuant to the sale may not be ordinarily binding on third parties who are not parties to those proceedings and for the mere production of the sale certificate title cannot be upheld. But facts of the present case are different. It establish that after obtaining Ext.A2 sale certificate, delivery of the property was taken under Ext.A3. The admitted jenmi Elangalloor Swaroopam recognised the right obtained by first respondent under Ext.A2 by Ext.A4 and A5. Moreover, O.S.559/1994 was a suit instituted by appellant in R.S.A.892/2007, as against Xavier which is admittedly in respect of a portion of the

property in the present suit. Though it was a suit for injunction, the right claimed by appellant was on the basis of the lease. The evidence of appellant when examined as PW1 in that suit as proved by Ext.A33 certified copy of the deposition establish that appellant not only did not dispute the title of first respondent Kinathumkara Samooha Madom but, recognising the right of Samooha Madom claimed that rent was being paid to the Kinathumkara Samooha Madom. Though when examined in the present suit appellant denied the said deposition, that defence can only be ignored in the light of Ext.A33 certified copy of the deposition. In the light of the admissions evidenced by Ext.A33, it is futile for the appellants now to contend that first respondent did not obtain right or title to the plaint schedule property or that Ext.A3 was only a paper delivery. Courts below rightly accepted the evidence and found the title of respondents 2 to 6.

7. True, when a question of tenancy is raised

and that question of tenancy arises for consideration in the suit, Section 125(3) of Kerala Land Reforms Act mandates that question of tenancy is to be referred to the Land Tribunal and finding of the Land Tribunal is binding on the trial court, though that finding could be challenged in a regular appeal filed against the judgment in the suit and appellate court is competent to modify vary or confirm the said finding. For the mere reason that appellants have raised a question of tenancy, it cannot be said that, question of tenancy is to be referred to the Land Tribunal. If on the materials available it is found that question of tenancy does not really arise, though plea was raised without bona fides, a reference is not warranted. It is clear from the evidence on record that appellants contended in the present suit that the lease was obtained from the Swaroopam 45 years back and has been in possession of the property as a tenant, evidence of the appellant in O.S.559/1994 as is clear from

Ext.A33 prove that it was not the case projected in the earlier suit. Moreover, there is no material to show that appellants were tenants of the plaint schedule property or was paying rent to the Elangalloor Swaroopam as claimed. Apart from the recitals in Ext.A8, there is no evidence to prove payment of rent. Learned counsel appearing for appellants submitted that recitals in Ext.A8, the sale deed executed by jenmi, establish that property was in the possession of appellants as tenants and therefore there is bona fides in the claim of appellants that they are tenants. It is absolutely clear from Ext.A8 that the said sale deed was procured in 1997, without disclosing when the lease was originated. There is no other material in support of the tenancy. Hence no reliance can be placed on the recital in Ext.A8 to uphold the tenancy. Moreover, though not inter parties Ext.A32 judgment which is binding on the appellants in R.S.A.892/2007 being the plaintiff in that suit, establish that his claim for tenancy was

not accepted by courts below and it was found that he has only kudikidappu right, if any in the building, though it is only in respect of a portion of the plaint schedule property herein, that finding is binding on the appellant. In the light of that finding, finding of courts below that appellants are not entitled to the tenancy right is also correct. Hence no substantial question of law arises on that point also.

8. It is true that inspite of the plea that appellants perfected their title by adverse possession, no issue was raised by the trial court on that question. First appellate court had taken note of this fact. But, finding that they are claiming to be kudikidappukars, it was held that their possession could only be permissive and so the plea of adverse possession cannot be accepted. Though ordinarily when a plea of adverse possession was not considered by the courts below, interference is warranted, on the facts and circumstances of the case, I do not find that it is

necessary. In the written statement, appellants specifically disputed title of respondents to the plaint schedule property. When the title of respondent recognised, they cannot perfect title by adverse possession as against the respondents as they cannot be in possession of the property with the requisite animus. Learned counsel appearing for appellants pointed out that Ext.A33 shows that appellants have recognised the title and in such circumstance, plea of adverse possession cannot be rejected on the ground that title is not recognised. If the case spoken to by appellant, when examined in the earlier suit is to be taken what was contended by him was that he is a tenant under first respondent Kinathumkara Samooha Madom. If that be the case, a tenant cannot perfect his title as against his own landlord, unless he repudiated the title of the landlord. If that be the case, it is for the appellants to plead, when the possession became adverse. There is no such pleading in the written statement. In such

circumstance, eventhough no specific issue was framed by courts below, and trial court did not consider the question, on the facts and evidence the plea based on adverse possession is not sustainable. Therefore on that ground also no interference is warranted.

9. Though learned counsel appearing for appellants argued that findings of the courts below that in Ext.A32 judgment, it was found that appellant in R.S.A.892/2007 is a kudikidappukaran and that finding is not correct as finding was only that he is a kudikidappukaran. On the facts I do not find that it is very material in this case. Evidence establish that respondents 2 to 6 have title to the plaint schedule property. Though appellants claimed that they are tenants, there is no materail in support of their claim. As rightly found by the courts below, they did not establish any tenancy right. In such circumstance, the decree granted by courts below are perfectly correct. Though a decree for fixation of boundary

was sought for in O.S.1930/1998, decree was not granted. Even if the appellants are kudikidappukars, unless they purchased the kudikidappu right, they cannot claim right or title to the appurtenant land. Whether the extent is 3 cents, 5 cents or 10 cents depending on the question where the kudikidappu is situate, so long as kudikidappu right was not purchased by appellants, it is not possible to fix the boundary of the area covered by the kudikidappu. The objection with regard to the report submitted by the Commissioner in such circumstances is also not material in this case. In the absence of any substantial question of law involved in the appeals, they are dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.934 /94

JUDGMENT

2ND NOVEMBER ,2007